

On May 21 2020, the Environmental Protection Agency (EPA) requested public comment on “whether the EPA should reconsider its current position that consultation under the Endangered Species Act (ESA) section 7 is not required when EPA approves a state or tribe’s request to assume the Clean Water Act (CWA) section 404 dredged and fill permit program under the CWA.” In response, EPA received public comments from various entities stating their positions (see federal register notice Docket Number: EPA-HQ-OW-2020-008). Several of those comments were supportive of reconsideration, while others raised some concerns. This memo addresses two specific matters raised in some comments: (1) the options for states to address the ESA considerations when choosing to assume the CWA 404 program; and (2) incidental take liability coverage for individual permittees that receive permits pursuant to a state’s assumed 404 program that underwent a one-time programmatic Section 7 consultation.

EPA Section 7 Consultation

Some public comments suggested that the only options, under the ESA and CWA, for states wishing to assume the 404 program are to: (a) require permittees to entirely avoid adverse impacts to listed species and critical habitat; (b) concede to “federalizing” permit applications that may adversely impact listed species or critical habitat; or (c) require applicant’s to seek an Incidental Take Permit under ESA Section 10. While these options may be the preferred approach for some states, the approach recommended by Florida actually preserves greater flexibility for all states who are considering whether to apply for assumption of the 404 program. Other states may wish to follow an approach similar to Florida’s approach here and assume a more complete 404 program, which would include the issuance of permits that may affect listed species and critical habitat. As set forth in the FDEP White Paper and in Federal Register notice, EPA has the discretion to consider impacts to listed species and critical habitat when deciding whether to approve a state’s Section 404 program. However, whether EPA is ultimately required to engage in Section 7 consultation when approving a State 404 program is a factual case-by-case determination and will depend on how a state chooses to develop its 404 program and whether EPA’s approval of that program may affect listed species and critical habitat. States remain free to fashion their particular programs in such a way as to avoid any possibility of effect on species or habitat as part of the assumption process by, for example, mandating that their state permittees entirely avoid impacts to listed species or critical habitat or require federalizing state 404 permits where such impacts may occur. But Florida’s program is not fashioned in this manner, for the reasons set forth in the White Paper, and we believe the approach Florida would take provides for a more effective and streamlined program.

Florida’s approach also promotes cooperative federalism, a key principle that underpins 404 program assumption. It is telling that virtually all states have delegated authority to administer the National Pollution Discharge Elimination System permit program under section 402 of the CWA, however only two states have assumed authority for the Section 404 program: Michigan in 1984 and New Jersey in 1994. The limited options for states seeking to assume the 404 program in addressing ESA liability - completely avoiding impacts, federalizing permits and Section 10 consultation- are not realistically feasible for states with an abundance of ESA listed species like Florida and present a significant obstacle to assuming the 404 program. Each of

these options obstruct the cooperative federalism structure of the CWA by restricting the ability of states to structure a 404 program that fully assumes permitting responsibilities for the states. For example, Florida is inhabited by 135 ESA listed species. Avoiding impacts (the first option) is not always feasible, especially for large scale projects. Similarly, “federalizing” permits through an “offramp” approach for the Corps to process permits that may cause impacts to listed species (the second option) reduces the scope of the state 404 program and largely obviates the purpose and benefit of delegation in the first place. Likewise, requiring Florida’s permittees to seek an ESA Section 10 Incidental Take Permit, with the requirement to prepare a Habitat Conservation Plan, would be extremely costly and take years to complete therefore is, likewise, not an option that Florida would pursue (although other states may wish to fashion their programs to require that kind of result).

It is important to bear in mind that Florida’s proposed approach does not mean that an ESA section 7 consultation will be required for all state approvals or that all states must follow the same path as Florida’s when developing their 404 program. The threshold question in determining whether a Section 7 consultation is required is whether the state’s 404 program being evaluated for assumption by EPA may affect listed species and critical habitat. For states like Florida that develop and want a fully assumed 404 program including the ability to issue permits for projects that may affect listed species, Section 7 consultation will be necessary. Conversely, for states that wish to pursue one of the other options suggested in the public comment – i.e., fashion a program that completely avoids ESA impacts, federalizes permits, or requires Section 10 ITPs - then Section 7 consultation will not be necessary because there will be no impact to listed species as a result of EPA’s approval of the program. For example, when New Jersey applied for 404 assumption, EPA engaged in informal Section 7 consultation and concluded that the assumption by New Jersey of the 404 program would not adversely affect listed species or critical habitat in that context. A change in EPA’s policy will only serve to remove obstacles and provide states with more options to pursue assumption of the 404 program.

Incidental Take Liability Protection

Next, some comments incorrectly argue that the programmatic approach will not provide state 404 permittees with take liability protection. Specifically, a commenter argues that, under Florida’s approach, “the resulting BiOp would not include an [Incidental Take Statement] sufficient to protect both the state as program administrator and private landowners subsequently seeking state permits from the risks of ESA incidental take liability.” This comment is wrong and reflects a misunderstanding of how programmatic consultation has worked in other contexts and how it would work here. Under Florida’s proposed programmatic consultation approach, liability protection under ESA Section 7 would, in fact, extend to state 404 permittees who comply with the terms and conditions of the technical assistance process set forth in the BiOp/ITS.

First, the comment letter misunderstands the Services’ current approach to programmatic consultation. The comment letter interprets the 2015 ESA rulemaking as constraining programmatic consultations and then further suggests that the recent changes to the ESA Section 7 regulations (in the 2019 regulations) have constrained programmatic

consultations to an even narrower set of circumstances. That is clearly incorrect. In the 2015 rulemaking and even more so in the 2019 rulemaking, the Services have expanded and promoted the use of programmatic consultation as a viable path to streamline and improve the incidental take authorization process. Indeed, *after the 2015 ESA rulemaking*, DOJ addressed this issue in a legal brief filed with the U.S. Court of Appeals for the Second Circuit:

*“[T]here is powerful incentive for permit applicants to implement the control measures, monitoring, and reporting requirements developed through the technical assistance process and specified in the permit, **in order to receive an exemption from the prohibition against take.** SPA 211, 213 (BiOp at 64, 66). While a facility could also obtain a take exemption pursuant to ESA §10, that process would require the facility to develop a habitat conservation plan that specifies the anticipated effects of the proposed taking, how those impacts will be minimized or mitigated, and explanation of the rejected alternatives considered by the applicant. 79 Fed. Reg. at 48,380 (summarizing Section 10 permit requirements). Here, **facilities have an incentive to comply with the technical assistance process and recommendations in order to obtain incidental take exemptions as part of their compliance with the NPDES permit process instead of going through a separate, additional process under ESA §10.**”*

The comment letter misses the point that the 2015 ESA rules expressly allowed for this approach (as DOJ’s brief shows). That approach was upheld by the Second Circuit. Moreover, under this Administration’s new 2019 ESA rules, the opportunities for programmatic consultation have been enhanced and expanded *even further*, not scaled back. For example, in the preamble to the ESA reform rules adopted by the Services in August 2019, the Services explained that programmatic consultation is a “**consultation technique that is being used with increasing frequency**” and that the reform rules “**promote the use of programmatic consultations as effective tools that can improve both process efficiency and conservation in consultations.**” 84 Fed. Reg. at 44996. The Services further explained that Section 7 of the ESA “**provides significant flexibility**” and that “various forms of programmatic consultations have been successfully implemented for many years now” – a “general practice” that the 2019 rules intended to “codify.” *Id.* (“programmatic consultation process offers great flexibility and can be strategically developed...”). In this respect, the comment letter seems to believe that a “framework programmatic consultation” is perhaps the only acceptable form of consultation; but that is a misunderstanding of the ESA rules as they exist today. *Id.* at 44997 (explaining the general term “programmatic consultation” as well as specific types such as “framework programmatic consultation” and “mixed programmatic consultation”).

Second, the comment letter misunderstands how the programmatic approach was actually used in the context of EPA’s Cooling Water Intake Structure Rule (“the 316(b) Rule”). As noted above (and explained in FDEP’s White Paper), EPA engaged in programmatic consultation with the Services with regard to the 316(b) Rule. The Services determined that the proposed action was likely to adversely affect listed species, and issued a “no jeopardy” Programmatic BiOp as well as a programmatic ITS covering implementation of the 316(b) Rule. The ITS provided: “[A]ny take incidental to the operation of a CWIS permitted under the

Rule through the implementation process described in this Opinion will be exempt from Section 9 and Section 4(d) prohibitions if the owner/operator implements enforceable control measures, monitoring, and reporting as agreed upon by the owner/operator and the Services, and as reflected in the permit.” The 316(b) Rule’s BiOp also explained the “technical assistance” process that would be used to allow for that take liability protection for the owner/operator of the facility – a process that is closely tracked in Florida’s 404 proposal. As explained in the ITS:

“Under the terms of sections 7(b)(4) and 7(o)(2), taking that is incidental and not intended as part of the agency action is not considered to be prohibited taking under the ESA provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement...The Services’ will have the opportunity to review all NPDES permit applications for each facility seeking compliance under 316(b) of the CWA, either during section 7 consultation with EPA or during the technical assistance process for State and Tribal-issued permits identified in the Rule. This affords the Services the opportunity to appropriately evaluate project effects on a site-specific and species-specific basis. This review will allow the Services to provide technical assistance to the State or Tribal Director and the owner/operator to adjust an action that may result in the take of endangered or threatened species. As described in our conclusion, we assume that through technical assistance with the State or Tribal Directors, appropriate control measures to minimize incidental take and detrimental effects associated with the operation of CWIS will be developed by the Services, and that these measures will ensure that each permit will minimize adverse effects and thereby avoid jeopardy to ESA-listed species identified in Tables 2 and 3 and avoid destruction or adverse modification of critical habitat. We also assume Directors will incorporate the Services’ recommendations into NPDES permits that contain 316(b) requirements. If it is determined, through section 7 consultation with EPA or through technical assistance on individual permits with State or Tribal Directors that take of ESA-listed species is still expected to occur after implementation of recommend-ed control measures, the amount or extent of incidental take will be quantified, at that time by the appropriate Field Office of the USFWS and/or Regional Office of the NMFS. Incidental take exemption will be afforded to EPA when the Rule, including its implementation process, is carried out as described in this Opinion. In addition, any take incidental to the operation of a CWIS permitted under the Rule through the implementation process described in this Opinion will be exempt from Section 9 and Section 4(d) prohibitions if the owner/operator implements enforceable control measures, monitoring, and reporting as agreed upon by the owner/operator and the Services, and as reflected in the permit.”

Third, the comment letter does not take into account how Florida and EPA would structure programmatic consultation in this situation. The comments fail to understand that the details of the technical assistance process would be established in a forthcoming applicant-prepared Biological Assessment (and ultimately, established in the BiOp with ITS). Instead, the comment letter makes incorrect assumptions about how that process would work. For example, the comment letter states that “private landowners would still need to undergo separate consultations on their individual permit applications to obtain ITS. Given this limitation, [the

commenter] questions how, from the perspective of a private landowner, Florida's preferred approach for obtaining ITS coverage would be significantly different from the existing off-ramp envisioned under CWA Section 404(j) and EPA's permit oversight regulations." The comment letter misunderstands how programmatic consultation would work here (just as the commenter misunderstood how incidental take coverage was provided under the 316(b) Rule example above). State 404 permittees would not be required to undergo separate consultations; the technical assistance process within FDEP's 404 process would be used for that purpose.

Relatedly, the comment letter incorrectly argues that the programmatic approach gives the Services too much authority to "impose measures to avoid and mitigate impacts on listed species under the guise of providing 'technical assistance,'" in the event where no impacts to listed species or critical habitat is involved. Under the approach Florida is proposing, those fears are unfounded. Under the programmatic approach contemplated here, the State of Florida (specifically, the FDEP and FWC) would screen each Section 404 application to assess whether the project is likely to have adverse impacts to listed species or critical habitats. Next, FWS would be given an opportunity to review Florida's preliminary screening assessment, and FWS may provide additional information (within a set timeframe) for FDEP and FWC to consider. If Florida determines that an application will have no adverse effects to federally listed species (or species proposed to be listed) and the USFWS has not submitted information or questions that would lead the State to reconsider its determination, the species review concludes for that application. There is no need for take liability protection in that context, and there is no further role for the Services to "impose" additional conditions or requirements. Only where an application has been determined by FDEP/FWC that there may be an impact to federally listed species (or species proposed to be listed), then technical assistance with FWS continues in order to determine if, and how, the impacts and effects will be addressed with protection measures. Where that technical assistance is triggered, FDEP/FWC and FWS will work together to seek agreement on protection measures. The BiOp with ITS will set forth how those protective measures will be established in coordination with FWS.

Likewise, the commenter raises the question: "If a coordination process like the process adopted in the BiOp and ITS on the CWIS Rule is adopted here, will individual permit applicants be allowed to dispute or opt out of incidental take coverage if they believe that their discharge-related activities are unlikely to result in incidental take?" The answer is, simply, yes. If the permit applicant disagrees with Florida's screening determination that the project is likely to impact listed species/critical habitat, the permit applicant can object and explain to Florida why they disagree with that determination. The permittee is also able to request that Florida federalize the permit and allow the applicant to seek coverage under a separate federal 404 permit with an individual incidental take permit (if needed) under Section 10 of the ESA. The BiOp with ITS is expected to make clear (as it did in the 316(b) Rule example) that an Incidental Take Statement does not apply if there is no incidental take involved. Indeed, the BiOp with ITS for the 316(b) Rule expressly acknowledged (at page 76): "This Incidental Take Statement does not apply in the absence of any take prohibited under Section 9 or Section 4(d) of the ESA."